STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
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The Honorable John Carney,
Governor

John McNeal, Director
SCPD

MEMORANDUM

DATE: September 1, 2021

TO: Corinna Getchell, Director
Division of Health Care Quality

FROM: Terri Hancharick, Chairperson
State Council for Persons with Disabilities

RE: 25 DE Reg. 137 [Home Health Agencies -Aide Only (Licensure)]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division Health Care Quality's (DHCQ) proposal to amend its regulation regarding Home Health Agencies -Aide Only (Licensure). Consistent with the *Summary of Proposal*, the intent is to update the regulatory language to clearly define the scope of practice required of a home health agency – aide only. In addition, the amendments intend to provide a level of protection for the patients that seek services from home health agencies – aide only, by ensuring the delivery of safe and adequate care. The proposed regulation was published as 25 DE Reg. 137 in the August 1, 2021 issue of the Register of Regulations. SCPD has the following observations.

First, the definition of "Clinical Director" requires at least one year of home health care experience and at least one year of administrative or supervisory health care experience. SCPD endorses the requirement, but questions whether one year of experience is sufficient for a job of this magnitude.

Second, "Medication Reminder" is an addition that defines a reminder as a verbal prompt and which specifically excludes administration or "any physical touching of the medication." The definition of "health aide services" is modified to include medication reminders. SCPD strongly recommends that DHQC further broaden the health aide services definition to include assistance with medication short of actual administration to competent individuals with disabilities who lack the physical ability to open a medication box or a bottle but who can otherwise self-administer. Currently, under restrictive Nurse Practices regulations, nurses cannot delegate

medication administration to anyone, licensed or not. Therefore, home health aides, who are supervised by nurses, cannot assist in administration. However, 24 Del. Code 1921(a)(15) allows competent individuals not in Chapter 11 facilities to direct unlicensed individuals to assist in administration; 25 Del Code 1921 (a)(16) authorizes lay administration under Section 1932 (child care workers, etc.) and 24 Del Code Section 1921(a)(17) allows caregivers to instruct and supervise personal care services employees to administer medications.

This can result in the unfortunate and potentially dangerous situation where licensed home health aides who are supervised by medical personnel cannot even touch medication and lay people can administer it. This may be an ADA violation because individuals with disabilities cannot utilize home health aides to provide assistance in administration as an accommodation. Also, the restriction defies common sense as a person who is under the supervision of a nurse cannot assist, and a person "off the street" can.

Third, "Service Area" is defined to include the county in which the agency office is located and the one immediately adjacent. The term is further used in Section 2.1.7 restricting service to this area with the exception of allowing "time limited travel outside of the service area." The ability of nurses and HHAs to travel with patients more broadly than the county where the office is located and the contiguous county is absolutely necessary in order to allow access to specialty health services, day programs, educational opportunities for children and family recreation and travel. Nursing or HHA services for these activities can be covered under Medicaid and waiver programs. SCPD recommends, at a minimum, that DHCQ further elaborate that these activities are contemplated by this exception to the "service area" restriction so there is no misunderstanding as to what "time limited" means.

Fourth, "Serious Injury" is a new definition which is restricted to physical injuries that create a substantial risk of death or which cause serious disfigurement, injury or impairment of function of any bodily organ. In Section 6.5.10, home health agencies are only obligated to report and investigate "major adverse events." These are defined to include suspected abuse and neglect, unexpected death, a medication error with the potential to cause harm, and an accident that causes "serious injury." The proposed language adds the qualifier "serious" to injury. This addition greatly diminishes the types of injuries that must be reported to the Department. Although the section does require reporting of suspected abuse or neglect, the restriction of accident reporting to "serious" injury may lead to under-reporting of such abuse and neglect. Accidents that are not life-threatening or potentially disfiguring nevertheless can be indicia of abuse or neglect that was not otherwise reported by a home health aide. SCPD strongly recommends that DHQC modify this language to require reporting of any injury that requires outside medical attention or treatment.

Fifth, in Section 6.2.2.5, the proposed regulation adds a home visit to the Assessment for the purpose of "determine[ing] whether the agency has the ability to provide necessary services in a safe manner." "Safe manner" and "safe" are not defined. While it is important for the agency to assess the home, the risk with this language is that it gives unlimited discretion to the agency to decide what "safety" is. SCPD may wish to ask DHCQ to provide parameters for this assessment, in order to avoid agencies discriminating based on perceptions of risk that may not be appropriate or that could be alleviated. For example, an agency may not allow a HHA to

serve people in a particular neighborhood based on generalized opinions about safety.

Sixth, Section 6.5.4 states the time frame for notes to be incorporated in the patient record is every 2 weeks. SCPD requests the justification for this time period since it could interfere with abuse and neglect investigations, and adequate supervision of client care as opposed to a shorter time period (e.g., every week).

Seventh, Section 6.6 discusses Discharge. There is no requirement that plans for discharge must be communicated to all health care providers participating the patient's care or the case manager. SCPD recommends such requirements. In addition, the regulation does not provide any parameters for involuntary discharge, nor does it provide for any meaningful obligation to assist the patient in finding alternative care. We are all aware of situations where agencies leave clients at risk of hospitalization or institutionalization by failing to assist in providing adequate planning for follow up care. We are all aware of situations where patients are dumped without good reason. SCPD recommends additional provisions strengthening the rights of consumers of these services so that they are not compromised by inadequate discharge planning and unfair discharges.

Eighth, Section 7.3 establishes the requirement that agencies have a grievance process for complaints without any details regarding these processes. SCPD requests more specificity regarding these procedures and additional language that redacted grievance data be publicly available and shared with the licensing agency.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations or recommendations on the proposed regulation.

cc: The Honorable Molly Magarik
Ms. Laura Waterland, Esq., DLP
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council